NO. 48308-4

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK AND PATRICIA MAYKO,

Respondents,

v.

PACIFIC COUNTY,

Appellant.

Appeal from Superior Court of Pacific County
Honorable F. Mark McCauley
No. 14-2-00350-3

RESPONDENTS' REPLY BRIEF

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I. INTRODUCTION

Pacific County Superior Court correctly found that the Pacific County Administrative Findings were not supported by substantial evidence, was an erroneous interpretation of law, and that the Respondents have met all the criteria to qualify for a variance. Pacific County persists in attempting to deprive the Maykos of any viable use of their land. The Respondents also assert that the County did not properly follow its prescribed procedures and that the County Decisions violated the Respondents' constitutional rights. This court should affirm the Superior Court ruling, and the Maykos should be awarded attorney's fees under RCW 4.84.370, 4.84.185 & RAP 14.2.

II. BACKGROUND

Appellant Pacific County appeals from the October 27, 2015 *Order on Appeal* signed by the Pacific County Superior Court. (CP 156.) The Order was entered pursuant to a Land Use Petition Act ("LUPA") appeal filed by Mark and Patricia Mayko, Appellees in this action (hereinafter "Respondents" or "Maykos"), which reversed the November 18, 2014 *Findings of Fact/Conclusions of Law and Decision Pertaining to Appeal of Administrative Decision No. PL140013LB* from the Pacific County Commissioners (CP 7-12) and the July 12, 2014 *Administrative Decision of Pacific County Hearings Examiner Michael Turner.* (CP 174-183.) The two decisions will be referred to collectively as the "County Decisions." The Superior Court found that both County Decisions were not supported by substantial evidence in light of the entire record, and that the conclusion

that the Respondents had not met all the criteria to qualify for a variance was an erroneous interpretation of law and an erroneous application of the law to the facts. (CP 160-166.)

III. STANDARD OF REVIEW

A. Pacific County Superior Court Correctly Applied the *De Novo* Standard to the County Administrative Decisions

In the County's brief, they note that the Court is to grant "substantial deference" to both legal and factual determinations by local jurisdictions. However, it is also important to emphasize RCW 36.70C.130 provides that a Court may grant relief if the moving party has sustained its burden of proof under ***any one*** of the six bases for granting relief, as stated below:

A. The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

B. The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of law by a local jurisdiction with expertise;

C. The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

D. The land use decision is a clearly erroneous application of the law to the facts;

E. The land use decision is outside the authority or jurisdiction of the body or officer making the decision;

F. The land use decision violates the constitutional rights of the party seeking relief.

Under established Washington Law, standards A, B, E and F present questions of law and should be reviewed *de novo*. *City of Olympia v Drebick*, 156 Wn.2d 289 (2006). Standard A is ordinarily applied when reviewing alleged procedural errors or irregularities. *Moss v. City of Bellingham*, 109 Wn. App. 6, (2001). Standard B calls for the court to grant deference to the local government's interpretation of the law where ambiguous. Standard C presents a factual determination, requiring the court to look at the record and determine whether the local jurisdiction's decision was adequately supported by substantial evidence. *United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 687-88 (2001). Standard D requires the court to consider whether the local jurisdiction properly applied the law to the facts and conclude whether the local jurisdiction's decision was clearly erroneous. This is a mixed issue of law and fact, and should also be reviewed *de novo*. *Leschi Improvement Council v. State Highway Commission*, 84 Wn. 2d 271, 284 (1974). A decision is "clearly erroneous only when the court is left with the definite and firm conviction that a mistake has been made." *Willapa Grays Harbor Oyster Growers Association v. Moby Dick Corp.*, 115 Wn. App. 417, 429 (2003).

Standard E directs the court to consider whether the local jurisdiction acted outside of its jurisdiction or authority in issuing the land use decision. *Biermann v. City of Spokane*, 90 Wn. App 816, 821-22 (1998).

Standard F requires the court to consider whether the local land use decision is a violation of a party's constitutional rights. *Peste v. Mason County*, 133 Wn. App 456 (2006).

The Pacific County Superior Court, after granting substantial deference to the findings of the Commissioners and Hearings Examiner, properly found that there was not "substantial evidence" in the record to support the Findings of the Hearings Examiner and the Commissioners. The Maykos believe that this is their strongest argument on appeal, but also argue that the law was improperly applied to the facts, that the law was improperly interpreted, that the procedure was unlawful, and that constitutional rights of the Appellants have been violated.

Rather than rehash every argument in the briefing, the Appellants will stick to simple rebuttal of the County's brief. Cites to the County's Brief will be noted as "CB".

IV. ADMINISTRATIVE DECISIONS INCORRECTLY INTERPRETED THE LAW, INCORRECTLY APPLIED THE LAW TO THE FACTS, AND THEIR DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE UNDER ORDINANCE 147

A. The Maykos Have Demonstrated That There Are Special Conditions and Circumstances Which Are Peculiar to the Land.

Contrary to the County's Brief, there was considerable evidence in the record that the Mayko's parcel is "special" as compared to other properties. Specifically, the property has very little upland area available for development, and the land that is available for development is all within 50 feet of the delineated wetland. (CP 188.) However, it is unique in that, despite these handicaps, building would have no impact on the wetlands. (CP 92, 190.)

The County appears to be arguing that there is no evidence in the record to suggest that other surrounding properties do not have the same traits. This is not the case. Even Ann Le Fors, one of the citizens who opposed the Mayko's application, testified that the Mayko's parcel was unique in that it had a joint easement adjacent to the property for access, and that this was unique within the Espy development, and perhaps on the entire west side of Willapa Bay. Ms. Le Fors also testified that other nearby properties that are landlocked may be denied development because of lack of access[sic]. (CP 125.) Ms. Le Fors also noted that the Espy lots are legal nonconforming lots, and could not be divided today the way they were at the time of platting. (CP 128.)

Further, at the hearing before the Commissioners, Robert ("Bob") Bogar testified that among the Espy Plats, there are only three parcels out of 25 within a half mile that have been short platted. (CP 35.) Mr. Bogar also noted that the fact that the driveway is already installed allows the Maykos to avoid directly impacting the wetlands to put in a road. (CP 37.)

Curiously, the County argues that the "unique features have no relevance to whether the property should get a variance." (CB 18-19) As a reminder, one of the six standards under Ordinance 147 is whether "special conditions and circumstances exist which are peculiar to the land." The County is correct that being unable to develop because of wetland buffers in not unique, but that is hardly the Mayko's only distinction. The record clearly delineates "special conditions and circumstances" that are "peculiar" to the Mayko's property. The Commissioners' Decision is not supported

by substantial evidence, is an erroneous reading of what the Ordinance is meant to address, and is an erroneous application of the law to the facts

B. The Maykos Have Demonstrated that Literal Interpretations of the Provisions of the Ordinance Will Deprive the Maykos of Rights Commonly Enjoyed by Other Properties Conforming to the Terms of this Ordinance.

The County refers to the Pacific County Tax Lot Map, which is the only map in the record, and notes that of the 11 parcels depicted, only one is developed. This is simply inaccurate. The property directly to the north of the Maykos is developed, as is the lot at the upper end of the map. At least four properties located to the west of Sandridge Road are developed, although you can only see a sliver of them on the Tax Lot Map. The five properties to the south of the Maykos do not appear to be developed.

However, even if the County's reading of the map was correct, it would not be dispositive of this issue. The standard does not direct the fact finder to count the number of developed properties within a certain radius of the applicant's parcel. The standard is whether strictly applying the rule restricting development in wetland buffers will deprive the Maykos of rights commonly enjoyed by other parcels *conforming to the terms of this Ordinance.*

The Maykos would note that this standard is somewhat mystifying. Obviously, if another parcel conforms to the terms of the Ordinance, the owners would have the "right" to develop it. If you don't conform to the terms of the Ordinance, you don't have the "right" to develop.

That said, at the hearing before the Commissioners, Bob Bogar submitted an example of a variance to build a single-family residence that was granted to another property located on the Long Beach Peninsula. (CP 38-39.) The property was similar, although in fact more restrictive, in that it was located next to a Category I Willapa Bay wetland. However, despite the proximity to the wetland, the party seeking that variance demonstrated building would only impact wetland buffers (as opposed to actual wetlands), and wetland credits were purchased from the Mitigation Bank. (CP 38-39.) In short, a property that was even closer to wetlands was permitted to build.

It is clear that strict reading of the Ordinance would keep the Maykos from any kind of development of their land. Unfortunately, the Maykos do not have as large of a parcel and as large of a buildable area as some properties located on Willapa Bay. This is why they don't comply with the Ordinance. But, given the unrefuted testimony that there will be no damage to the wetlands, this case is a perfect example of why the County has variances available. (CP 24, 27, 35, 92, 106.) The Administrative Decisions are not supported by substantial evidence, is an erroneous reading of what the Ordinance is meant to address, and is an erroneous application of the law to the facts.

C. There Are, at Best, a Limited Number of "Similar" Properties. But, in any case, the Maykos Have Demonstrated that the Variance will not Grant them any Special Benefits Denied to Similarly Situated Properties.

The County argues that "If the Court grants the Maykos a variance on their property, there is nothing to prevent the development of other properties in the aforementioned tax map, and indeed properties up and down the west coast of Willapa Bay. There is no wonder that the hearings examiner and then the Commissioners listened when the representative of the Willapa Bay Oyster Growers Association, Dick Sheldon, spoke against this development." (CB 23.)

The argument that granting this variance will create a "slippery slope" and remove all development restrictions on the west coastline of Willapa Bay does not stand up to scrutiny. First, any property asking for a variance in the same manner as the Maykos would still have to show, in addition to showing a lack of "special benefits", the other five factors under the Ordinance, i.e., that it has "special circumstances" peculiar to it, that the applicant would be denied rights given to others conforming to the ordinance, that the applicant did not create any of the special circumstances and conditions, that the variance is the minimum necessary to afford relief, and that granting the variance will not significantly impact critical areas and/or be materially detrimental to the public welfare. Is the County seriously arguing that there are a host of properties along the Bay that meet all of these standards?

Second, the standard is not whether granting the variance will undercut all development standards. The standard is whether granting the

requested variance will confer on the applicants a special privilege that is denied by the CARL Ordinance to other lands, structures, or buildings under similar circumstances. There is no evidence in the record, much less "substantial evidence" that the Maykos will receive a special benefit denied to other similarly situated property owners. Who are these owners?

Other factors show the lack of a grant of special benefit. First, at the hearing before the Commissioners, Mr. Bogar submitted an example of a variance to build a single-family residence that was granted to another property located on the Long Beach Peninsula. (CP 38-39.) The property was similar, although in fact more restrictive, in that it was located next to a Category I Willapa Bay wetland. Second, with the variance submitted as an example by the Maykos, the evidence demonstrated building would only impact wetland buffers (as opposed to actual wetlands), and wetland credits were purchased from the Mitigation Bank. (CP 38-39.) Third, similar to the other property of the variance granting of this variance will provide the Maykos with the option to construct a single-family residence on their property. Finally, an existing gravel road already runs along the southern property boundary, providing access to the bay. (CP 77.)

In summary, the Mayko's property will not obtain any privilege not already given to a similarly situated landowner. The County's finding that the granting of the variance will grant a special privilege to the Maykos is not supported by substantial evidence, is an erroneous reading of what the Ordinance is meant to address, and is an erroneous application of the law to the facts.

D. The Variance Requested Is the Minimum Necessary to Afford Relief.

The County agrees that "for the purposes of obtaining their building permit for a single-family residence with attached garage, this variance is the minim [sic] necessary to afford relief". (CB 25.) However, the County argues that a single-family residence is not necessary for the Maykos to have any "use" of the property, arguing that they can park an R.V. on the property.

There was ample evidence, including the Planner's Report, at both hearings to show that, given the physical characteristics of the property, the variance is the minimum necessary to afford relief.

The County cites to *Bueschel v. Department of Ecology*, 125 Wn. 2d 196 (1994) for the proposition that sometimes lots rendered unbuildable by regulation still have some economic value for recreation such as floating docks, decks or boathouses. However, *Bueschel* also states that "the size, location, and physical attributes of a piece of property are relevant when deciding what is a reasonable use of a particular parcel of land." *Bueschel* at 208-09. Further, in *Bueschel*, there was evidence in the record that "nearby waterfront parcels were used for recreation purposes, including docks, floats, decks or boathouses, but without homes on the property." Finally, in *Bueschel*, the applicant landowner testified that "a residence would be more aesthetically pleasing to him than a trailer site for a mobile home or a recreational vehicle park or a boat shed."

There is no evidence in the record to show that there were other reasonable recreational uses that the Maykos disdained to pursue. The bulk

of the property is wetlands, and any building of docks or floats would directly interfere with them. The Mayko property is 900 feet long, and approximately 131 feet wide. The building site is on the western most edge of the property. (CP 185.) The upland site extends 75 feet from the western property boundary, and extends for the entire width of the parcel, 131 feet. (CP 186.) Matt Reider's Report found that the building of a single-family residence as described by the Maykos was "the minimum necessary to provide relief." According to the Section 2.0 of the Wetland Mitigation Report, the delineation of the wetlands was limited to the western 150 feet because the center and east part of the property appears to be freshwater wetlands transitioning to saltwater wetlands. (CP 211.) This data clearly shows that the Maykos have a very limited building area to work with, and that what is offered is effectively the minimum they can do to make economic use of the property. The Maykos clearly demonstrated that the variance requested is the minimum necessary to afford relief, and the County findings that the Maykos have not done so is not supported by substantial evidence, is an erroneous reading of what the Ordinance is meant to address, and is an erroneous application of the law to the facts

E. The Maykos clearly demonstrated that the requested variance will not create significant impacts to Critical Areas and resource lands and will not be materially detrimental to the public welfare or contrary to the public interest.

The County argues that the proposed development will create significant impacts to critical areas because one citizen testified that the property was subject to flooding at extreme high tides, and because another

citizen testified that the variance will "impact wetland buffers" and "Approval of this permit ***may*** have a cumulative effect on the surrounding area and the peninsula as a whole (emphasis added)." (CB 12.)

The County also argues that Mr. Reider and Mr. Bogar were not looking at the "big picture", and were only looking at one parcel. They also argue that neither Mr. Reider nor Mr. Bogar looked at whether this variance would enable similar variances. (CB 26.) However, in Mr. Reider's report, he specifically addresses this in analyzing whether granting of the variance will give the Makyos a special privilege. He states:

> Each variance request is heard and decided on its own merits. The granting of this variance will provide the property owner the option to construct a single-family residence on his property. An existing gravel road already runs along the southern property boundary, providing access to the bay.

(CP 188-89.) This is not a deep analysis of the cumulative impact, but the point is well taken, each variance request is heard and decided on its own merits.

The County then argues for the probative value of the citizen testimony by noting that Ms. LeFors provided the only testimony referring to the legal standards, which shows that her analysis is sophisticated. (CB 27.) The County argues that Mr. Sheldon's testimony is of great value because the organization he purports to represent attempts to "monitor" development along the Bay and would have objected if a similar variance had been applied for in the past. (CB 27.) There is no proof in the record that Mr. Sheldon actually represents the Oyster Growers. Finally, the County notes that neither the Hearings Examiner nor the Commissioners

made much of a record of the backgrounds and knowledge of the citizens, or of the individual Commissioner's specialized knowledge of the area in question. (CB 27.) That is certainly true, but the record was clear on the professional expertise of Matt Reider, who was employed as a Pacific County land use planner, and Bob Bogar, who is a hydrogeologist.

Mr. Bogar performed a wetlands delineation and determined that the the building site was at least two hundred feet from the ordinary high watermark. (CP 105-06.) Mr. Bogar also determined that the property is higher than the highest tidal inundation, absent storm surges (CP 139-144) Mr. Reider visited the site, consulted with the Department of Ecology on the wetlands, and reviewed FEMA FIRM maps and the Flood Insurance Rate Map. (CP 94-96.)

Both Matt Reider and Bob Bogar noted that the project would not have significant impacts on the wetlands or other critical areas. The Maykos provided evidence that the entire upland boundary will be mitigated for by purchasing off-site, in-kind mitigation credits from Long Beach Mitigation Bank. As noted by Matt Reider, conditions can be placed, if approval is granted, to allow protection of the property's wetland community. (CP 189.) The Administrative Decision states that there is "evidence that to afford the relief requested the variance may create significant impacts to critical areas and resource lands." (CP 82.) The Commissioners' Decision states that "[t]he applicants did not provide adequate evidence that the relief requested by the variance would not create significant impacts to critical areas and resource lands." (CP 10.) It is clear from the record that there is

no scientific evidence of any kind to support these findings. Both Mr. Reider and Mr. Bogar determined that there would not be significant impacts. The only facts in the record suggestive of "impacts" are Dick Sheldon's unsupported beliefs as to the elevation of the land and the possible impact of the home, and Ms. Le Fors belief that granting the variance will create some kind of "slippery slope", where granting this variance will allow every property to get a variance, regardless of circumstances.

The County's assertion that the Maykos needed to show that the project would not affect the wetland *buffer* begs the question: How would one show that they don't affect a buffer, as opposed to actual wetland communities? As a practical matter, the whole property is in a wetland buffer, so, by the County's reading, no one could ever get a variance within a wetland buffer.

The Maykos have clearly demonstrated that the variance will not create a substantial impact to critical areas, and the Administrative Decisions are not supported by substantial evidence, is an erroneous reading of what the Ordinance is meant to address, and is an erroneous application of the law to the facts

V. THE COUNTY COMMISSIONERS' DENIAL OF THE VARIANCE WAS A VIOLATION OF THE MAYKO'S CONSTITUTIONAL RIGHTS

The County argues that, because the Maykos did not offer an alternative to building a single-family home on the property, they did not show that the Administrative Decisions deny all economically viable use of

the property. (CB 37.) The only "economically viable" use the County can point to, without any citation to the Ordinance, is that the Maykos "are permitted to park an RV on this spot and enjoy the magnificent view across the bay." (CB 25.)

The Mayko's property is a small lot directly abutting Willapa Bay, with wetlands on-site. When the Maykos purchased the property in 1993 it was lawful to construct a single-family residence on the property without the need of a variance. On April 13, 1999, Pacific County passed its Critical Areas and Resource Lands Ordinance (CARL), which included new regulations on wetland buffers.

The Makyos invested considerable sums in the property, including purchase price, property taxes, septic design and property maintenance, and reasonably expected that their investment would allow them to construct a home on the property. The use that the County proposes for the Maykos suggests that they should purchase an RV and park it on their driveway to enjoy the view. This is the same use available without charge all along the entire beach, up and down the Long Beach Peninsula. Clearly, the denial of the variance has deprived Respondents of any economically viable use of their property. Where beachfront lots are subjected to a construction ban, the lots are economically idle and the owners are forced to sacrifice all economically viable use of the land. Regulations requiring land to be left in a natural state result in a total taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The denial of the Maykos' request for a variance is an unconstitutional taking without compensation.

VI. THE MAYKOS SHOULD BE AWARDED ATTORNEY'S FEES AND COSTS

The County argues that Maykos did not seek attorney's fees for a frivolous defense within 30 days of the entry of the order granting their LUPA decision, so they do not qualify. However, the Maykos are asking for attorney's fees for the County's appeal to the Court of Appeals, not for the appeal to Superior Court.

Pacific County Superior Court found that the County Decisions were not supported by substantial evidence and improperly applied the law to the facts. The facts have not changed for this appeal, and the County's appeal is frivolous and advanced without reasonable cause. Attorney fees can also be awarded under RAP 14.2.

RCW 4.84.370 provides that attorney fees are only awarded if the "prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings." However, in *Habitat Watch v. Skagit County*, 155 Wn.2d 397 (2006), the petitioning private party argued that RCW 4.84.370 denies equal protection on two theories. First, the private party argued that the statute discriminated among private parties based on their alignment with the local government, rather than on the merits of their positions. *Id.* at 414-15. Second, the private party also argued that the statute discriminated between the local government and private parties, arguing that the government will never be the losing party because it will always prevail before itself at the administrative level. *Id.* at 416. The Court was ultimately unpersuaded by these arguments, but the Respondents believe they continue to have relevance in this case, and argue

that an equal protection should allow them to be awarded attorney's fees if they prevail in this appeal.

VII. CONCLUSION

It is evident from reviewing the record that both the Administrative Decision and Commissioners' Decision denying the variance are erroneous interpretations of the law and clearly erroneous applications of the law to the facts, even after giving deference to the local jurisdiction's expertise. There is no evidence based on any kind of professional or scientific expertise to support the decisions.

There is un-contradicted scientific evidence that building a single-family dwelling and septic system on the land will have no impact on wetlands or other critical areas. It is also clear that building a single-family home is the minimum economic use the Maykos can make of their property. There is evidence that other properties abutting the wetlands on Willapa Bay have been granted variances to build on their land, and it is clear that the Maykos' parcel is unique in its shape, location, and driveway access. Both Decisions posit that the Maykos provided "no evidence" to support their Petition, in clear contradiction to the record. Those findings are clearly not supported by substantial evidence in light of the whole record before the Court. Finally, the denial of the variance removes all viable economic use of the Maykos' property, and clearly constitutes a taking under *Lucas*.

This Court should affirm the Order of the Pacific County Superior Court to grant a variance to the Maykos to build a single-family residence

with septic on their property, and should award attorney's fees and costs to the Respondents on appeal.

Respectfully submitted this 10th day of June, 2016.

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CERTIFICATE OF SERVICE

I, TAMRON CLEVENGER, hereby certify that on the date listed below, I caused the foregoing Brief of Respondent to be electronically filed with the Court of Appeals and a copy emailed and hand-delivered and addressed as follows:

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